

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF

MCLEAN ENTERPRISES LLC
COPPER CREEK SUBDIVISION
GERALD, T4N, R23E, S5
DALE COUNTY, ALABAMA
NPDES ALR16ECB9

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) ORDER 10-XXX-WP
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FINDINGS

Pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.), the Alabama Water Pollution Control Act (hereinafter “AWPCA”), Ala. Code §§ 22-22-1 to 22-22-14 (2006 Rplc. Vol.), the ADEM Administrative Code of Regulations (hereinafter “ADEM Admin. Code r.”) promulgated pursuant thereto, and § 402 of the Federal Water Pollution Control Act, 33 U.S.C. § 1342, the Alabama Department of Environmental Management [hereinafter “Department”] makes the following FINDINGS:

1. McLean Enterprises, LLC (hereinafter “Operator”), is an Alabama developer constructing the residential subdivision Copper Creek Subdivision (hereinafter “Facility”) located in T4N, R23E, S5, on Merriweather Rd., in Gerald, Dale County, Alabama. Sediment and other pollutants in stormwater runoff from the Facility have the potential to discharge and/or have discharged to Harrand Creek, and an unnamed tributary to Harrand Creek, waters of the State.

2. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.).

3. Pursuant to Ala. Code § 22-22A-4(n) (2006 Rplc. Vol.), the Department is the state agency responsible for the promulgation and enforcement of water pollution control regulations in accordance with the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 to 1387. In addition, the Department is authorized to administer and enforce the provisions of the

Alabama Water Pollution Control Act, Ala. Code §§ 22-22-1 through 22-22A-16 (2006 Rplc. Vol.).

4. The following references and acronyms are used in this Order and, when used, shall have the meaning of the name or title referenced below.

BMPs	Best Management Practices
CBMPP	Construction Best Management Practices Plan
NTUs	Nephelometric Turbidity Units
NOR	Notice of Registration
NOV	Notice of Violation
NPDES	National Pollutant Discharge Elimination System
QCP	ADEM-recognized Qualified Credentialed Professional
UT	Unnamed Tributary

5. Pursuant to ADEM Admin. Code rs. 335-6-12-.05(1) and 335-6-12-.11(1), the Operator is required to submit to the Department an NOR in order to register for and obtain NPDES coverage prior to commencing and/or continuing regulated disturbance activities.

6. On August 22, 2008, the Operator submitted to the Department an NOR requesting NPDES coverage under ADEM Admin. Code chap. 335-6-12 for regulated disturbance activities and discharges of treated stormwater from the Facility. The NOR was incomplete and the Operator was notified of the deficiencies by phone. On June 23, 2009, the requested information to complete the NOR was submitted by the Operator. The Department granted registration ALR16ECB9 to the Operator on June 23, 2009. Registration ALR16ECB9 is scheduled to expire on June 22, 2010. However, during an inspection of the Facility on March 13, 2009, the Department documented that the Operator had not re-registered for and obtained NPDES coverage, although regulated disturbance activities and/or discharges had commenced and/or were continuing.

7. Therefore, the Operator violated ADEM Admin. Code r. 335-6-12-.11 by operating an NPDES construction site without NPDES coverage as required.

8. ADEM Admin. Code r. 335-6-12-.21(1) states "that [c]ommencement and/or continuation of NPDES construction activity is prohibited after March 1, 2003, or the effective date of this Chapter, whichever date occurs later, unless effective BMPs are implemented and

maintained in accordance with a CBMPP prepared/certified by a QCP as adequate to meet the requirements of this Chapter and applicable requirements of ADEM Administrative Code Division 335-6.” ADEM Admin. Code r. 335-6-12-.21(1) also requires that the CBMPP and any BMPs shall meet or exceed the technical standards of ADEM Admin. Code chap. 335-6-12, and the Alabama Handbook For Erosion Control, Sediment Control, And Stormwater Management On Construction Sites And Urban Areas published by the Alabama Soil and Water Conservation Committee (hereinafter the “Alabama Handbook”).

9. On March 13, 2009, the Department also documented that the Operator had not properly implemented and maintained effective BMPs, resulting in discharges of sediment and other pollutants in stormwater runoff to Harrand Creek and an UT to Harrand Creek.

10. In addition, during the March 13, 2009, inspection, significant accumulations of sediment resulting from discharges at the Facility were observed by the Department offsite, in Harrand Creek and an UT to Harrand Creek.

11. On April 14, 2009, an NOV was sent to the Operator by the Department as a result of the March 13, 2009, inspection. The NOV notified the Operator of violations documented at the Facility, and required the Operator to submit to the Department a report prepared by a QCP showing steps that were taken at the Facility to correct the noted violations within thirty days of receipt of the NOV. The Department granted an extension of the compliance deadline contained in the NOV sent on April 14, 2009, in order to provide additional time for the Operator to submit to the Department a complete NOR and to correct noted deficiencies. The required report has not been received by the Department.

12. Ala. Code § 22-22-9(e) requires an operator to respond within the specified time frame to a notice of violation or non-compliance by the Department. The Operator violated Ala. Code § 22-22-9(e) by failing to respond to the NOV.

13. The Department inspected the Facility on October 23, 2009, and documented that the Operator had not properly implemented and maintained effective BMPs resulting in discharges of sediment and other pollutants in stormwater runoff to Harrand Creek and an UT to Harrand Creek.

14. In addition, during the October 23, 2009, inspection, significant accumulations of sediment resulting from discharges at the Facility were observed by the Department offsite, in Harrand Creek, and an UT to Harrand Creek.

15. The Operator violated ADEM Admin. Code r. 335-6-12-.21(1), by commencing and continuing NPDES construction activity on March 13, 2009 and October 23, 2009, without having implemented effective BMPs that meet or exceed the technical standards of ADEM Admin. Code chap. 335-6-12, the site CBMPP, and the Alabama Handbook.

16. The Operator violated ADEM Admin. Code r. 335-6-6-.03(1), by allowing the unpermitted release of sediment to Harrand Creek on March 13, 2009, and again on October 23, 2009.

17. Analyses of water samples collected by the Department on March 13, 2009, from Harrand Creek which receives stormwater discharges from the Facility, indicated an upstream turbidity of 7.16 NTUs and a downstream turbidity of 99.8 NTUs, resulting in an increase of 92.64 NTUs. Analyses of water samples collected by the Department on October 23, 2009, also from Harrand Creek, indicated an increase of 178.5 NTUs. In addition, during the March 13, 2009 and October 23, 2009, inspections, the Department observed that stormwater discharges from the Facility were causing substantial visible contrast in instream turbidity in Harrand Creek and an UT to Harrand Creek. This violates ADEM Admin. Code rs. 335-6-12-.26(5) and 335-6-10-.09.

18. Pursuant to ADEM Admin. Code rs. 335-6-12-.26(5) and 335-6-10-.09, discharges from the Facility shall not cause turbidity downstream of the Facility to exceed upstream turbidity by 50 NTUs, nor shall discharges from the Facility cause substantial visible contrast in instream turbidity.

19. Pursuant to Ala. Code § 22-22A-5(18)c. (2006 Rplc. Vol.), in determining the amount of any penalty, the Department must give consideration to the seriousness of the violations, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit

which delayed compliance may confer upon such person; the nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violations upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty. Any civil penalty assessed pursuant to this authority shall not be less than \$100.00 or exceed \$25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the Department shall not exceed \$250,000.00. Each day such violation continues shall constitute a separate violation. In arriving at this civil penalty, the Department has considered the following:

A. SERIOUSNESS OF THE VIOLATIONS: The Department noted 228 violations of ADEM Admin. Code chap. 335-6 and the AWPCA. Considering the general nature of each violation, the magnitude and duration of each non-compliant discharge, their effects, if any, on impaired waters, and any available evidence of irreparable harm to the environment or threat to the public, the Department determined the base penalty to be \$36,000.00.

B. THE STANDARD OF CARE: The Department noted a number of violations, such as the timely submittal of the NOR, were non-technical requirements and easily avoidable. The Department also noted that the Operator did not submit the required documentation in response to the Department's April 14, 2009 NOV.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: The Operator avoided certain costs associated with proper implementation and maintenance of BMPs, however, the magnitude of these cost savings and resulting economic benefit, if any, is unknown.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATIONS UPON THE ENVIRONMENT: The Department is unaware of any efforts by the Operator to minimize or mitigate the effects of the violations upon the environment.

E. HISTORY OF PREVIOUS VIOLATIONS: The Department is unaware of violations similar and in addition to those noted above.

F. THE ABILITY TO PAY: The Department is unaware of an inability of the Operator to pay the civil penalty.

G. The civil penalty is summarized in Attachment 1.

ORDER

Based on the foregoing FINDINGS and pursuant to Ala. Code §§ 22-22A-5(10), 22-22A-5(12), 22-22A-5(18), and 22-22-9(i) (2006 Rplc. Vol.), it is hereby ORDERED:

A. That, within forty-five days of receipt of this Order, the Operator shall pay to the Department a civil penalty in the amount of \$39,000.00 for the violations cited herein. Said penalty shall be made payable to the Alabama Department of Environmental Management by certified or cashier's check and shall be remitted to:

Office of General Counsel
Alabama Department of Environmental Management
PO Box 301463
Montgomery, Alabama 36130-1463

B. That the Operator shall immediately cease all construction, building, production, and related activity at the Facility other than BMP implementation / maintenance, and sediment removal / remediation. Construction and related activity other than BMP implementation / maintenance, and sediment removal / remediation is not authorized to resume until approved in writing by the Department.

C. That the Operator shall take immediate action to prevent, to the maximum extent practicable, sediment and other pollutants in stormwater leaving the Facility and prevent noncompliant and/or unpermitted discharges of pollutants to waters of the State.

D. That, within five days of receipt of this Order, the Operator shall have a QCP perform a comprehensive inspection of the Facility, offsite conveyances, and affected State waters.

E. That, within ten days of receipt of this Order, the Operator shall submit to the Department a CBMPP, prepared/certified by a QCP, detailing effective BMPs that meet or exceed the technical standards outlined in ADEM Admin. Code chap. 335-6-12 and the Alabama Handbook.

F. That, within thirty days of receipt of this Order, the Operator shall fully implement effective BMPs, designed by a QCP, that meet or exceed the technical standards outlined in the

Alabama Handbook, the site CBMPP plan, and ADEM Admin. Code chap. 335-6-12, and correct all deficiencies at the Facility and offsite conveyances, including sediment removal or remediation.

G. That, within seven days of the completion of the activities required in F above, the Operator shall submit to the Department a certification signed by the QCP that effective BMPs that meet or exceed the technical standards outlined in The Alabama Handbook, the site CBMPP plan, and ADEM Admin. Code chap. 335-6-12, have been implemented, all deficiencies have been corrected, and full compliance with the requirements of ADEM Admin Code chap. 335-6-12, has been achieved at the Facility, offsite conveyances, and affected State waters.

H. That this Order must not affect the Operator's obligation to comply with any Federal, State, or local laws or regulations.

I. That final approval and issuance of this Order are subject to the requirement that the Department provide notice of proposed Orders to the public, and that the public have at least thirty days within which to comment on the proposed Order.

J. That, should any provision of this Order be declared by a court of competent jurisdiction or the Environmental Management Commission to be inconsistent with federal or State law and, therefore, unenforceable, the remaining provisions herein shall remain in full force and effect.

K. That, except as otherwise set forth herein, this Order is not and shall not be interpreted to be a permit or modification of an existing permit under federal, State or local law, and shall not be construed to waive or relieve the Operator of the Operator's obligations to comply in the future with any permit coverage.

L. That the issuance of this Administrative Order does not preclude the Department from seeking civil penalties, criminal fines or other appropriate sanctions or relief against the Operator for the violations cited herein.

M. That failure to comply with the provisions of this Administrative Order shall constitute cause for commencement of legal action by the Department against the Operator for recovery of additional civil penalties, criminal fines, or other appropriate sanctions or relief.

ORDERED and ISSUED this _____ day of _____, _____.

John P. Hagood, Director
Alabama Department of Environmental Management
1400 Coliseum Boulevard
Montgomery, AL 36110-2059
(334) 271-7700

Attachment 1
Penalty Calculation Worksheet

Violation	Number of Violations	Seriousness of Violation & Base Penalty*	Standard of Care*	History of Previous Violations*
ADEM Admin. Code r. 335-6-12-.11; Operating an NPDES construction site without NPDES coverage	1	\$3,000.00	\$1,500.00	
ADEM Admin. Code r. 335-6-12-.21(1); Commencing and continuing NPDES construction activity without having implemented effective BMPs	2	\$10,000.00		
ADEM Admin. Code r. 335-6-6-.03(1); Unpermitted release of sediment to a water of the State	2	\$10,000.00		
Ala. Code § 22-22-9(e); Failing to respond to NOV	1	\$3,000.00	\$1,500.00	
ADEM Admin. Code rs. 335-6-12-.26(5) and 335-6-10-.09; Causing or contributing to a contravention of Alabama water quality standards	2	\$10,000.00		
Totals:	8	\$36,000.00	\$3,000.00	\$0.00
Economic Benefit*:				Unknown
Mitigating Factors*:				\$0.00
Ability to Pay*:				\$0.00
Other Factors*:				\$0.00
Final Penalty:				\$39,000.00

* Refer to the "Findings" of the Order for a description of each penalty factor